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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 211

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioner,

vs.

CHICAGO UNION STATION COMPANY,

Respondent.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

Respondent's Brief in opposition to the Petition for Certiorari (pp. 1-10) concerns itself mainly with the contention that petitioner has waived its right to urge that the courts below erred in failing to construe the Interstate Commerce Act (Title 49 U.S.C.A. Secs. 1(3), 20 (11)) as pertinent and controlling on the governing facts of this case, on the ground that Petitioner failed to urge this issue in the trial court.

The record refutes this contention, since it shows that the issue was so urged.

In the Appendix filed on behalf of plaintiff in the Court of Appeals, containing portions of the record of this cause in the trial court, copies of which were filed with the Petition for Certiorari herein, the following finding of fact was submitted to the trial court by plaintiff (App. 116, Fol. 424):

> "1. That defendant makes no claim of limitation of its liability for the loss of the receptacles and their contents delivered to its red caps by reason of any tariffs filed in compliance with any requirements of the Interstate Commerce Act, and that none was filed pursuant thereto."

The trial court rejected this proposed finding (App. 121).

The excerpt from the trial court record, set forth at folio 391, page 1a of Appellee's Appendix following Appellee's Brief in the Court of Appeals, (copies of which were filed with the Petition for Certiorari herein), also shows that the question of the applicability of the Interstate Commerce Act, was urged in the trial court.

Respondent's counsel there stated:

> "Mr. Roepher: I don't know whether counsel has been attempting to convert this case from a State case to an Interstate Commerce case * * *"

It is apparent, from the submitted finding and from the statement of Respondent's counsel set forth above, that the question of whether Respondent's liability was governed by the pertinent sections of the Interstate Commerce Act (Title 49, U.S.C.A., Secs. 1(3), 20(11)), was urged in the trial court, and that no waiver thereof occurred, as sug-

gested by Respondent. This conclusion is inevitable if any purpose is to be ascribed to the foregoing record references.

II.

Respondent's contention, at page 1 of its Brief in opposition, that the failure of Petitioner to plead either the Interstate Commerce Act (Title 49 U.S.C.A. Secs. 1(3), 20(11)), or the "statutory provisions for federal question and commerce jurisdiction" (Title 28 U.S.C.A. Secs. 1331, 1337 respectively), constituted a waiver of its right to "recover on a federal or commerce ground", is contrary to established law, as shown by the following decisions.

In *Banks* v. *King Features Syndicate, Inc.*, (SD NY 1939) 1 FR Serv. 8a 32, Case 1, the court stated:

> "It is not necessary to allege the different statutes or constitutional provisions, for the court will take judicial notice of them."

In *Crispin Company* v. *Lykes Bros. Steamship Co.*, 134 F. Supp. 704, the court said at page 706:

> "When facts are alleged which bring the statute into play, a specific reference to it is unnecessary and immaterial. *Great Northern Ry.* v. *Galbreath Co.*, 271 U.S. 99, 46 S. Ct. 439, 70 L. Ed. 854; *McGoon* v. *Northern Pac. Ry.*, D.C. 204 F. 998, and cases there cited."

The allegations of the Complaint (App. 2-6) clearly set forth facts which bring the Interstate Commerce Act "into play." The essence of the Complaint is: Petitioner's assured delivered property to Respondent, which operates an interstate railroad passenger terminal in Illinois, to be redelivered to him aboard a train departing therefrom

for Minnesota, which was not done, to Petitioner's resultant damage.

Title 49 U.S.C. Sec. 1(3), defines "railroads" to include:

> ". . . terminals, and terminal facilities used or necessary in the transportation of the persons or property designated herein . . ."

Section 20(11) of Title 49 U.S.C. includes railroads as defined in Section 1(3) cited above.

We submit therefore that the allegations of the Complaint, (which recite the delivery of property to Respondent for purposes clearly incident to interstate commerce, in which activity Respondent is obviously engaged), bring the Interstate Commerce Act "into play", and disclose a controversy dependent for its outcome upon a construction of the Interstate Commerce Act.

III.

Since the Complaint (App. 2-6) discloses a controversy dependent for its outcome on a construction of the Interstate Commerce Act, the failure of the courts below to construe the act as applied to the facts, and to grant recovery, constitutes a manifest error of law.

In *Kansas City, St. L. & C. R. Co.* v. *Alton R.R. Co.*, (7 Cir.) 124 F. 2d 780, the Court correctly applied the established doctrine, stating (p. 785):

> "(2) If the appellant has stated a cause of action for any relief, it is unimportant what he designates it, or what he has asked for in his prayer; the Court will grant him the relief to which he is entitled under the facts pleaded. Par. (c) of Rule 54, Federal Rules of Civil Procedure, 28 U.S.C.A. following No. 723c."

Thus even if the Complaint upon which Petitioner proceeded below did not refer to the Interstate Commerce Act as a basis for recovery, the Court nevertheless had a duty to construe and apply the same to the facts, and to grant relief thereunder.

In *Gins v. Mauser Plumbing Supply Co.*, 148 F. 2d 974, 976, the Court stated (p. 976):

> ". . . When the parties are at issue, . . . particular legal theories of counsel yield to the Court's duty to grant relief to which the prevailing party is entitled, whether demanded or not. Federal Rules of Civil Procedure, Rule 54(c) . . ."

IV.

It is respectfully submitted that whether plaintiff below did or did not proceed upon the theory that the controversy required a construction of the Interstate Commerce Act, the important and exceptional nature of the instant case warrants that this Court grant the Writ and reach the merits of this cause, for the reasons set forth at pages 7-9 of the Petition filed herein.

Ample support for the foregoing is contained in:
Hormel v. Helvering, 312 U.S. 552, 557, 61 S. Ct. 719, 721, 85 L. Ed. 1037, 1041 where Mr. Justice Black, speaking for the Court, stated:

> ". . . There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. See *Blair v. Oesterlein Mach. Co.*, 275 US 220, 225, 72 L. Ed. 249, 252, 48 S. Ct. 87".

and in the Memorandum of Mr. Justice Frankfurter to the opinion of this Court in *Kerman* v. *American Dredging Co.*, (1958) 355 U.S. 426, 441, 2 L. ed. 2d 382, 400, 78 S. Ct. 394, 408, where it is stated:

> "This is a case which involves a serious question of the construction of a statute of nationwide importance. Such questions of construction are among the most important issues for final determination by this Court."

V.

The core of Respondent's argument (at pages 10 to 18 of its Brief in opposition) is that, even under the Interstate Commerce Act, the failure of Petitioner's assured to make an unsolicited disclosure of the nature and value of the contents of the sample cases, delivered to the red cap employed by Respondent, precludes recovery on the ground that such failure to disclose occasioned the loss.

We submit first that the misdelivery of the sample cases and their contents to an impostor, by Respondent's red cap, without requiring the surrender of the claim checks, can under no circumstances be attributed to the failure to disclose the nature and value thereof. Secondly, such a construction of the Interstate Commerce Act is not only contrary to the express provisions of the Act (Title 49 U.S.C.A. Sec. 20(11)), which prescribes the means by which Respondent could have avoided the absolute liability imposed thereby (which it failed to do), but is contrary to the decision of this Court in *New York, N.H.* v. *H.R. Co.* v. *Nothnagle*, 346 U.S. 128, 97 L. Ed. 1500.

We submit that this erroneous construction of the Interstate Commerce Act, urged by Respondent, as an operator of a large railroad passenger terminal serving four inter-

state railroads (App. 13, Fol. 19A), clearly indicates the importance of the question here involved, and the need for a full determination thereof by this Court, in order to insure the application of a nationally uniform policy governing interstate railroads' liability for property loss (*New York, N. H. & H. R. Co.* v. *Nothnagle*, 346 U. S. 128, 97 L. ed. 1500), and to avoid injustice.

CONCLUSION.

For the reasons stated in the Petition and this Reply, it is respectfully submitted that a Writ of Certiorari should be granted in this cause.

Respectfully submitted,

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